SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 549

DANDY PRODUCTS, INC., A CORPORATION, AND JOSEPH M. GRON, INDIVIDUALLY AND AS AN OFFICER OF SAID CORPORATION, AND JOSEPH M. GRON AND CARLO E. FERRARI, COPARTNERS TRADING AND DOING BUSINESS AS CAPITOL MAILERS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Dandy Products, Inc., Joseph M. Gron et al., pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case. The opinion and order of the Court of Appeals were rendered on June 11, 1964 and a final decree was entered on July 10, 1964.

OPINIONS BELOW.

The court below affirmed an order to cease and desist entered by the Federal Trade Commission (hereinafter the "Commission") because of an alleged violation of Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719 (1914) as amended, 15 U. S. C. Sec. 45(a)(1)(1958).

The Initial Decision of the Hearing Examiner is appended hereto as Appendix A. The Commission's order and its opinion, adopting the Initial Decision and order of the Hearing Examiner are appended hereto as Appendix B. The opinion of the Court of Appeals affirming the Commission is reported at 332 F. 2nd 985 and appended hereto as Appendix C.

JURISDICTION.

The order denying rehearing and the final decree of the Court of Appeals, which are appended hereto as Appendix D and Appendix E, were entered on July 7, 1964 and July 10, 1964, respectively. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1)(1958).

QUESTIONS PRESENTED.

1. Is the Commission obliged to inquire into and determine contemporary standards of business fairness in order to administer the Wheeler-Lea Amendment of the Federal Trade Commission Act within the bounds of Article I, Section 1, of the United States Constitution in adjudging specific acts or practices in business as unfair?

2. Does the Commission deny respondents due process of law by finding their business practices to be unfair and ordering discontinuance of such practices without hearing any evidence on the subject of the fairness or unfairness of such practices and thus by apparently basing its determination on official notice of material facts not appearing in the

evidence without affording respondents an opportunity to show the contrary?

3. Did the Supreme Court of the United States intend *Keppel & Brothers* v. *Federal Trade Commission*, 291 U. S. 304, to be a perpetual mandate against the use of chance in the sale of goods in commerce?

4. Was the Commission barred by its finding that a cease and desist order against Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, is not warranted from making its order applicable to Joseph M. Gron, copartner trading and doing business as Capitol Mailers.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statute involved in this case is Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. Sec. 45(a)(1958), which in pertinent part provides that:

> "(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> "(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

A constitutional provision involved is Article I, Section 1, which provides in part as follows:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Also involved is Section 8 of Article I of the United States Constitution which provides in part as follows:

> "The Congress shall have the power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Another provision involved is Article V of the Amendments to the United States Constitution, which provides in part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT.

The petitioner, Dandy Products, Inc., is an Illinois corporation with its principal place of business at 9 South Clinton Street, Chicago, Illinois. The petitioner, Joseph M. Gron, is an officer of the corporate petitioner, who directed and controlled the acts and practices of said corporation, and his business address as such officer is the same as that of said corporation.

The individual petitioners, Joseph M. Gron and Carlo E. Ferrari, are copartners doing business under the partnership name of Capitol Mailers with their office and place of business located at 555 West Adams Street, Chicago, Illinois. Capitol Mailers has since November 1, 1945, been engaged in the business of providing a mailing service to firms in various lines of business, which require assistance in getting out large mailings. Among its customers for whom it provides such mailing services are Sears Roebuck and Company, Standard Oil Company, Swift & Company, Allstate Insurance Company, Lee Ward Company, Dun & Bradstreet, Charles World Encyclopedia and over 100 other firms, one of which was Dandy Products, Inc.

The Federal Trade Commission issued a complaint charging the petitioners with unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, through use of lottery schemes or games

of chance in the sale and distribution of their merchandise. Said complaint charged the petitioners were engaged in the sale in interstate commerce of transistor radios, watches, cameras, ball point pens, toy animals, dolls, small electrical appliances including lamps, cutlery, and other merchandise, to the public and to stimulate the sale of said merchandise the petitioners supplied to the public push cards and instructions describing how the merchandise might be awarded to purchasers of chances on said cards as prizes as well as to the sellers of said chances and thus the merchandise be sold and distributed to the public by means of a lottery scheme or game of chance. The complaint alleged that said practice is contrary to the established public policy of the United States and is unfair.

The petitioners filed an answer denying said charges. Thereafter at Chicago, Illinois, a hearing was held, at which Joseph M. Gron and Carlo E. Ferrari testified adversely in response to subpoenas from the Commission and George M. Holt, Arlene Sisk, and Mrs. Raymond Stover testified on behalf of the Commission that they had received printed material and merchandise from Dandy Products, Inc., and push cards and instruction sheets "similar" to certain Commission exhibits which were presented to them for inspection.

It appeared from the exhibits, including the push cards, that prospective purchasers are given the opportunity of buying the merchandise outright at stated prices, without using the push card, and that on the push cards appeared the statement: "IF YOU DESIRE TO PURCHASE MERCHANDISE FROM US YOU CAN DO SO AT ANY TIME. TOTAL $20.95." One of the three Commission's consumer witnesses, Arlene Sisk, had sent in $20.95 for two transistor radios without using a push card and without complaint about the merchandise which was shipped to her.

The Hearing Examiner, William K. Jackson, who had

heard the proceeding, filed his Initial Decision in which he found Capitol Mailers had merely provided a routine mailing service to Dandy Products, Inc., and

> "A cease and desist order against Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, is not warranted and the hearing examiner so concludes."

The Hearing Examiner further found that Dandy Products, Inc., and Joseph M. Gron, individually and as an officer of said corporation, had been engaged in the sale of merchandise to the purchasing public in a manner involving a game of chance or the sale of a chance to procure said articles of merchandise at a price much less than the normal retail price thereof, that said practice is contrary to the public interest and constitutes unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. He so found despite the fact that no evidence had been presented to prove the method of merchandising to be unfair.

Although the Hearing Examiner had found that the issuance of an order against Joseph M. Gron, copartner trading as Capitol Mailers, was unwarranted, he further found:

> "It should also be pointed out as proposed by complaint counsel and as hereinafter adopted by the hearing examiner, the cease and desist order issued in this proceeding includes both respondent Dandy Products, Inc., and Joseph M. Gron, individually and as an officer of the corporation. Since the order will apply to Joseph M. Gron individually, it will apply to his activities as a partner in Capitol Mailers as well as an officer of Dandy Products, Inc., or in any other capacity and insures the practices found to be against the public interest will be effectively stopped by the order to cease and desist."

Included as a part of the Initial Decision was a cease and desist order commanding Dandy Products, Inc., and Joseph

M. Gron, individually and as an officer of said corporation, "in connection with the offering for sale, sale and distribution of transistor radios, . . . or any other articles of merchandise, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

> "Supplying to, or placing in the hands of others push cards or any other lottery device or devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.
>
> "Shipping, mailing or transporting to agents or distributors, or to members of the purchasing public, push cards or any other lottery device or devices which are designed or intended to be used in the sale or distribution of respondents' merchandise, wares or goods to the public by means of a game of chance, gift enterprise or lottery scheme.
>
> "Selling or otherwise disposing of any merchandise, wares or goods by means of a game of chance, gift enterprise or lottery scheme."

It was further ordered that "the complaint herein be, and the same hereby is, dismissed as respects respondent, Carlo E. Ferrari." The Initial Decision did not dismiss the complaint as to Capitol Mailers or as to Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers.

The petitioners thereafter filed Exceptions to the Initial Decision in accordance with the Rules of Practice of the Commission, and these Exceptions were orally argued before the Commission, itself. The Commission issued its decision denying petitioners' Exceptions to the Initial Decision and adopting the Initial Decision of the Hearing Examiner as the decision of the Commission.

Upon petition to review the Court of Appeals for the Seventh Circuit affirmed the decision and order of the Commission, holding that the law is firmly established that the sale of goods by means of a game of chance is contrary to the established public policy of the United States and that this practice is no less unfair today than it was in the time of Keppel. The court did not discuss the failure of the Commission to prove the practice unfair with evidence.

REASONS FOR GRANTING THE WRIT.

1. The business practices of millions of American businessmen are controlled by the decisions of the Federal Trade Commission. This Court has never considered the question of what is the criteria or policy laid down by Congress expressly or impliedly for the administration of the Wheeler-Lea Amendment. If there is a policy, businessmen ought to know what it is, lest they innocently run afoul of the law. The Commission recognizes no criteria except the personal and varying attitudes of the Commissioners toward morality.

Section 5, (a) (1) of the Amended Federal Trade Commission Act 15 U. S. C. Sec. 45(a) provides: "Unfair methods of competition in commerce, and *unfair* or deceptive *acts or practices in commerce,* are hereby declared unlawful." (Emphasis supplied.) Section 5, (b) provides that the Commission shall act if it shall appear that a proceeding would be "in the interest of the public". There is no other language in the act to indicate criteria or policy. This Court went into considerable detail in *New York Cent. Securities Corp.* v. *U. S.,* 287 U. S. 12 (1932) at pages 24 and 25 and in the earlier case of *Akron, Canton & Youngstown Railway Company* v. *U. S.,* 261 U. S. 184 at page 184 to show how the term "public interest", as used in the Trans-

portation Act of 1920 was "not a concept without ascertainable criteria". In the latter case this Court said:

> "Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court in New England Divisions Case (*Akron, C. & Y. R. Co.* v. *United States*) 261 U. S. 184, 189, 190, 67 L. ed. 605, 609, 43 S. Ct. 270, adverted to that *purpose, which was found to be expressed in unequivocal language;* 'to attain it, new rights, new obligations, new machinery were created. The Court directed attention to various provisions having this effect, and to the *criteria which the statute had established* in referring to 'the transportation needs of the public,' 'the necessity of enlarging transportation facilities,' and the measures which would 'best promote the service in the interest of the public and the commerce of the people.' The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred". (Emphasis supplied.)

What then is the criteria provided by Congress in relation to the expressions, "unfair act or practice," and "the interest of the public," as used in the Amended Federal Trade Commission Act?

In *Schechter* v. *United States*, 295 U. S. 495 (1935), both the opinion of Chief Justice Hughes and the concurring opinion of Justice Cardozo commented extensively upon the differences between the National Industrial Recovery Act and the Federal Trade Commission Act to indicate why

the former was an unconstitutional delegation of legislative power and the latter was not. The latter act did not give the power of an arbitrary imposition of rules of business conduct, but required a consideration of practices in the business community before a businessman might be put out of business. Said Justice Hughes:

> "What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive methods and of what is found to be a specific and substantial public interest". (Emphasis supplied.)

In his concurring opinion Justice Cardozo clarified the distinction when he said:

> "If codes of fair competition are codes eliminating 'unfair' methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered. For many years a like power has been committed to the Federal Trade Commission with the approval of this court in a long series of decisions". (Emphasis supplied.)

Later, Justice Cardozo said:

> "When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers."

But the *Schechter* case, 295 U. S. 495, was decided before the enactment of the Wheeler-Lea Amendment. At the time of the *Schechter* decision the Commission was acting under criteria laid down by Congress, namely, the standard of current competitive business practices, for the Commission could only proceed if the practice was an "unfair method of competition". This criteria was removed after the *Schechter* case by the Wheeler-Lea Amendment. This Court has never ruled upon the constitutionality of that

Amendment. Prior to the Amendment it was necessary for the Commission to determine and show with evidence the deleterious effect the practices of a respondent would have on competition. It should not be supposed however that the broadening of the powers of the Commission left it without obligation to "ascertain upon inquiry" prevailing practices so as to determine standards of practices against which "unfair . . . acts or practices" may be determined. Only by such inquiry and appropriate findings can it condemn a practice without exercising its powers in an unconstitutional manner.

The Federal Trade Commission's function is not that "of censoring the morals of businessmen". *Federal Trade Commission* v. *Keppel & Brother, Inc.*, 291 U. S. 304 (1934). Its duty is "to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop". *Federal Trade Commission* v. *Standard Education Society*, 86 Fed. 2d 692 (1936). (Emphasis supplied.)

The Commission must determine relatively what the morals of businessmen are and relatively what the morals of the community are in which businessmen operate for then only can it determine what is unfair or immoral without imposing a censorship of business. Its function is that of determining the moral tone of the business community and preventing substantial deviations from it, while at the same time allowing the widest latitude of conflict. It is only by administering the Wheeler-Lea Amendment of the Federal Trade Commission Act in accordance with the principles outlined above that it may be distinguished from the National Industrial Recovery Act.

In the case before this Court the practice which is condemned is the sale of merchandise by the use of the element of chance. No evidence was adduced by Counsel for

the Commission of moral standards in the present business community with respect to this type of merchandising. The burden upon the Commission here indicated would have made their case less convenient and, perhaps, the requirement would not have been expedient, but convenience and expediency are not grounds for an unconstitutional administration of delegated power. Counsel for petitioners do not here contend that the Federal Trade Commission Act, as amended, is unconstitutional, but rather that the manner of its enforcement by the Federal Trade Commission with regard to its determination of the unfairness of individual business practices is and that the case before this Court is not an exception.

2. The Commission's order deprives respondents of their property without due process of law by finding their business practices to be unfair and ordering discontinuance of such practices without hearing any evidence on the subject of the fairness or unfairness of such practices or their impact on competitors, consumers or the business community. Since there is no evidence in the record on the subject, the Commission apparently must be basing its determination on official notice of material facts not appearing in the evidence without affording respondents an opportunity to show the contrary.

We earnestly urge that the powers conferred by the Wheeler-Lea Amendment of 1938 to the Federal Trade Commission Act (15 U. S. C. Sec. 45(a) (1)) have been unconstitutionally exercised in this case. Under the original Federal Trade Commission Act of 1914 and until the Amendment of 1938 only "unfair methods of competition in commerce" were declared unlawful. Under this provision the Commission was required in each case to present evidence of the moral standards prevailing in the business community and the existence of competitors of the respond-

ent who were not using the method of competition complained of.

The Wheeler-Lea Amendment of 1938 added to the acts declared unlawful "unfair or deceptive acts or practices." With respect to "deceptive acts or practices" deception can be and always is proven by the Commission with evidence. Evidence is presented showing what advertising claims were made for the product and what the nature of the product is with respect to the matters on which the claims are made. A substantial discrepancy between the advertising claims made and the true merit of the product as established by evidence, provides a factual basis for a finding of deception. The requirement that the charges be proven by evidence and that the Commission bear its burden of proving its charges, is thus met.

But in dealing with "unfair" acts or practices the Commission feels that it should not have to prove what is fair or what is unfair. It wants to just decide this, not prove this. It wishes to prove with evidence what the respondent did and then determine at its conferences and without hearing evidence on the subject whether the thing done was unfair. This is very unlike what is done in the deception cases and in the cases charging the use of unfair methods of competition.

Certainly due process requires that there be evidence in the record establishing that the practice in question was unfair. The determination of unfairness should not be based on the personal opinion, whims or prejudices of the individual Commissioners nor on their officially noticing facts not in the record without giving the respondent the opportunity to show the contrary.

3. In *Federal Trade Commission* v. *Keppel & Brother, Inc.*, 291 U. S. 304 (1934) this Court did not take it upon itself to dictate public policy. Its language was that "it

was clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy". This Court was in effect determining public policy from the common law and criminal statutes which it found to be then existing. That common law and criminal statutes change from time to time can hardly be disputed.

The *Keppel* case has been cited again and again as the gospel which prevents all businessmen from including in any sales plan any element of chance in any business climate. That case was decided in the heart of the greatest depression the country has ever known. The decision dealt with a business of selling candy, which was limited to school children so young that they were "unable to protect themselves". The candy was so packed as to be integrated with a gambling plan. The goods were inferior to that of competing straight goods. This was indeed an extreme case. Should it rule out forever the element of chance in any form in business practice? Would such a position be consistent with the duty of the Federal Trade Commission to follow the progressive development of the "conscience of the community?"

In the last 29 years, culturally and economically, our society has changed radically. Public attitude toward chance has changed, both in entertainment, business and otherwise. Millions watch television programs in which chance is the central theme and they do so projecting themselves in the person of the contestants. Increasing millions of United States citizens put money into the stock market for solely speculative reasons.

The argument made here is two-fold: first, that the employment of the element of chance in merchandising is no less fair or moral than the use of other merchandising techniques in present day business practice and, second, that the use of the element of chance in the manner em-

ployed by petitioners is no less fair or moral than the use of the element of chance by other merchandisers in the business community of today.

As our Gross National Product approaches $600,000,000,000, industry finds it increasingly necessary to find new and different ways to motivate consumer purchases. Motivation research has become an important factor in marketing programs. As a result of motivation studies, marketing campaigns are developed where the emphasis is placed upon emotions, even human weaknesses and frailties, rather than the merits of the product. The day of competition on the basis of merit alone has long since passed, if it ever existed. Merchandisers sell the feeling of security, reassurance of wealth, status symbols, ego-gratification, love objects, a sense of power and of immortality as well as their products. The emotional motives of emulation, individuality and conformity are played upon. Almost since its inception the automobile industry has traded upon psychological obsolescence created by annual model change with its consequent stimulation in consumers of inclinations toward ostentation and prodigality, characteristics which many moral philosophers would place on the lower end of the scale of morality. The point here made is that standards of fair dealing in present day business practice permit of playing upon the emotions of the consuming public even though such action may detract attention from the comparative merits of the goods involved; indeed, the vitality of the distribution of the product of our free enterprise system requires the widest latitude in the development and use of motivating techniques. The essence of free competition is the freedom of businessmen to use whatever motivating techniques their ingenuity may devise.

The morality or immorality of a business practice does not turn on its potential for vice if the standard is to be determined from prevailing practices. Moralists, al-

most universally, regard promise breaking as immoral and, if it be true that it is, as a general proposition, it is all the more capable of verification in commerce, since the entire foundation of our economy rests upon promise keeping. Personal bankruptcies, which involve the wholesale breaking of promises and are, in a large measure, a result of the easy credit policies of merchants, have skyrocketed by more than 450% in the last ten years. Yet, one would not seriously contend that the granting of easy credit by some merchants is unfair to other merchants who sell the same lines of goods on a cash basis, nor that it is unfair to members of the consuming public in the light of prevailing practices. Regulation of credit practices by the Federal Trade Commission on any pretext of unfairness or immorality would be a usurpation of Congressional legislative power.

Like other forms of emotional motivation, chance injected into a merchandising plan adds a feature other than merit and thereby tends to detract from the consumer's rational motivation. It cannot be condemned for this, since prevailing business practices clearly condone the use of emotional motivation. As easy credit has a potential for vice, so the consumer who is exposed to a merchandising plan encompassing a chance element, one might reason, may be led into a life at the race tracks and the slot machines. Again, it cannot be condemned for this, since prevailing standards of fairness condone merchandising techniques which may lead to vice. Easy credit may well lead to bankruptcy. It should be noted that few ethical philosophers view gambling immoral per se, while promise breaking is almost universally agreed to be immoral.

Petitioners' practices cannot be considered unfair because they take advantage of the natural instinct to gamble since industry takes advantages of every instinct in man to merchandise goods as an accepted practice in accord-

ance with present standards of fair dealing; petitioners' practices cannot be considered unfair because they may develop the consumer's tendency toward vice since the most wide spread of merchandising practices, easy credit, leads to an almost universally regarded form of immorality, namely, promise breaking.

A survey of current magazines on any given week throughout the year will reveal several contests sponsored by highly regarded national firms, which may not be directly tied in with purchases of their products, but require participants to get entry blanks from dealers in their products. Are these reputable, well established firms, trading as they are on the consuming public's inclination to gamble, acting below present standards of business or are they setting the standards? Are they unfair to those who do not run contests along with their over-all merchandising plans? Is there any real difference between any of these merchandising plans and those of the petitioners?

Business practices bespeak the standards of businessmen and cannot be ignored. Businessmen in the over all are concerned with their image. The use of the element of chance in merchandising is not new and the fact that it is widely used in business today testified to its recognition as within present business standards.

The whole basis of the *Keppel* decision, 291 U. S. 304, is: "* * * it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy". In the three decade interval since the *Keppel* decision, the criminal statutes dealing with the subject have been undergoing a profound change.

In all, some 24 states have legalized gambling in some form.

The position of the petitioner, Dandy Products, Inc., is not that its sales plan is novel but that the moral tone

of the business community in which it operates is substantially different than the moral climate prevailing when the *Keppel* case, *supra*, was decided thirty years ago. Methods of competition incorporate innumerable motivating devices which are separate and distinct from the merits of the goods being sold, and these motivating devices standing alone might be condemned as vices by a majority but are essential in a dynamic commercial society. This Court should reconsider the position taken in *Keppel* in the light of the business climate of today and, particularly, in view of the use of its dicta by the Federal Trade Commission in its aggrandizement of power.

4. The Commission is barred from making its order applicable to Joseph M. Gron, copartner trading and doing business as Capitol Mailers by its own finding that a cease and desist order against Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers is not warranted.

The Commission found in part as follows:

> "Under these circumstances, and in the absence of any precedents extending the doctrine of the cases cited to persons engaged in providing mere routine services, a cease and desist order against Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, is not warranted and the hearing examiner so concludes."

The Federal Trade Commission Act, 15 U. S. C. Sec. 45(c) provides:

> "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

Since the above finding is supported by evidence, the Commission should have dismissed its complaint as to the partnership and both partners as such, and it should be barred from making its order applicable to Joseph M.

Gron's activities as a member of the partnership known as Capitol Mailers.

But the Commission in its decision ruled:

> "Since the order will apply to Joseph M. Gron individually, it will apply to his activities as a partner in Capitol Mailers as well as an officer in Dandy Products, Inc., or in any other capacity and insures that the practices found to be against public interest will be effectively stopped by the order to cease and desist."

CONCLUSION.

The writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A.

Filed November 27, 1962

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of Dandy Products, Inc., a corporation and Joseph M. Gron, individually and as an officer of said corporation, and Joseph M. Gron and Carlo E. Farrari, copartners trading and doing business as Capitol Mailers.	Docket No. 8467.

INITIAL DECISION.

William K. Jackson, Hearing Examiner.

Roy B. Pope, Counsel Supporting the Complaint.

Charles H. Rowan and Willis W. Hagen,
Milwaukee, Wisconsin,
Counsel for Respondents.

This proceeding was commenced by the issuance of a complaint on February 9, 1962, charging the respondents with unfair acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act, through the use of lottery schemes or games of chance in the sale and distribution of their merchandise.

This proceeding is now before the hearing examiner for final consideration upon the complaint, answer thereto,

testimony and other evidence, proposed findings of fact and conclusions of law filed by both parties and briefs. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by the parties and briefs in support thereof, and all findings of fact and conclusions proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered the record herein and being duly advised in the premises makes the following findings as to the facts, conclusions drawn therefrom, and order.

FINDINGS OF FACT.

1. Respondent, Dandy Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 9 South Clinton Street, Chicago, Illinois. Respondent, Joseph M. Gron, is president of the corporate respondent and has his office and place of business at the same address as the corporate respondent. Said individual respondent formulates, directs and controls the acts and practices of the said corporate respondent.

2. Individual respondents, Joseph M. Gron and Carlo E. Ferrari, are copartners trading and doing business as Capitol Mailers with their office and principal place of business at 555 West Adams Street, Chicago, Illinois. The business address of the respondent, Joseph M. Gron, is as hereinbefore set forth and the business address of the respondent, Carlo E. Ferrari, is the same as that of the partnership. The individual respondents formulate, direct and control the acts and practices of the partnership.

3. Respondents, Dandy Products, Inc., and Joseph M. Gron, are now and for some time last past, have been

engaged in the offering for sale, sale and distribution of transistor radios, watches, cameras, ball point pens, toy animals, dolls, small electrical appliances including lamps, cutlery and other articles of merchandise to the public and have caused their said merchandise when sold to be transported from their place of business in Chicago, Illinois, to purchasers thereof located in the various states of the United States, and now maintain, and for some time last past have maintained, a substantial course of trade in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. The respondents, Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, are now, and for some time last past, have been engaged in providing mailing services to firms in various lines of business requiring assistance in getting out large mailings. Among their customers for whom they provide such mailing services are Sears Roebuck and Company, Standard Oil Company, Swift & Company, Allstate Insurance Company, Lee Ward Company, Dun & Bradstreet, Charles World Encyclopedia and over 100 other firms. Dandy Products, Inc. is only one of their clients and the percentage of Capitol Mailers' total business done for Dandy Products, Inc. is approximately 16 per cent. Specifically, the services performed by Capitol Mailers for Dandy Products, Inc. are as follows: the push cards, circulars, order blanks and return envelopes, together with the envelopes in which they are to be mailed and the mailing lists of the prospective customers are delivered to Capitol Mailers, in bulk, and packaged in large cartons; one of each of the various pieces above described is placed in the envelope to be sent to the proposed customer; a sticker containing the name and address of the proposed customer is affixed and the envelope sealed, and the envelopes are then tied, sacked and delivered to the post office for mailing

to various states of the United States. Respondents, Joseph M. Gron and Carlo E. Ferrari, copartners trading as Capitol Mailers, in performing such mailing services, act under the direction and control of Dandy Products, Inc. In performing such services, Joseph M. Gron and Carlo E. Ferrari, copartners trading as Capitol Mailers, sell no merchandise in interstate commerce and are merely paid for their services on the basis of $5.90 per 1,000 items mailed. Joseph M. Gron and Carlo E. Ferrari, copartners trading as Capitol Mailers, do not process, handle, prepare for mailing or mail, respondent's, Dandy Products, Inc., merchandise.

5. Respondents, Dandy Products, Inc. and Joseph M. Gron, in the course and conduct of their business, in offering for sale, selling and distributing their merchandise, furnish and have furnished, various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is offered for sale, sold and distributed to the purchasing public. Among the methods and sales plans adopted and used by the aforesaid respondents, and which is typical, but not all inclusive, of the practices of the respondents, is the following:

Respondents, Dandy Products, Inc. and Joseph M. Gron, distribute and have distributed, to operators and to members of the public, through the use of the mailing services of Capitol Mailers described above, certain literature and instructions including, among other things, push cards, order blanks and circulars which have thereon illustrations and descriptions of said merchandise. Said circulars also explain respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards, and as prizes to members of the purchasing public who purchased chances or pushes on said cards. One of Dandy Products, Inc.'s push cards,

which is typical of all push cards distributed by them, bears forty names with ruled lines on the back of said card for writing in the name of the purchaser of the push corresponding to the name selected. Said push card has forty partially perforated discs. Each of said discs bears one of the names corresponding to those on the lines of the reverse side. Concealed within each disc is the number which is disclosed only when the disc is pushed or separated from the card. The push card also has a larger master seal and concealed within the said master seal is one of the names appearing on the discs. The person selecting the name corresponding with the one under the master seal receives a fountain and candlestick ensemble. The push card bears the following legend or instructions:

"(Picture of Table Showing
Centerpiece and Two Candlesticks)

Lucky Name Under Seal Gets This
Spray-A-Lite Fountain & Candlestick Ensemble

- Translucent marbelized plastic
- Sends up a sparkling fountain of water from petaled water lily
- Measures a full 16" in diameter
- Packet of realistic ferns included
- Automatically recirculates water
- 110 V AC Current
- Complete with cord and plug

Complete With Matching Candlestick Holders

Pure enchantment wherever you place it . . . on your dining table, buffet or artfully displayed on your sunporch or patio. The entire ensemble is spectacular as a centerpiece or you can use the fountain and candlesticks separately.

Nos. 4 and 17 receive a beautiful retractable ball point pen.

No. 1 pays 1c, No. 4 pays 4c, No. 9 pays 9c, No. 17 pays 17c. All others pay 49c. None Higher.

Do Not
Remove Seal
Until Entire
Card is
Sold

Push Out
with Pencil

(Appearing on Reverse Side.)

ADA	MIN
AL	NAN
AMY	PAT
ANG	PEG
ANN	RAY
ART	ROY
BAB	SAM
BEA	SID
BEN	SIS
BES	SYB
DOC	SUE
DON	TED
FAE	TES
GIN	TIM
JAN	VAL
LEA	VEE
LOU	VIC
MAE	VIV
MEG	WES
MIL	WIN

This card contains 40 names. No. 1 pays 1c; No. 4 pays 4c; No. 9 pays 9c; No. 17 pays 17c; all others pay 49c; None Higher. This card is given to you absolutely free. If you wish you can use this as a sales card. It can be used with any merchandise. Prospective purchaser is not obliged to pay unless he desires to do so. If You Desire To Purchase Merchandise From Us You Can Do So At Any Time.

Total $17.95

Postmaster: This parcel may be opened for postal inspection if necessary."

6. Sales of the merchandise of Dandy Products, Inc. and the respondent, Joseph M. Gron, by means of said push cards are made in accordance with the above described instructions, and the prizes or premiums are allotted to the customers or purchasers from said cards in accordance with the above legend or instruction. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for the merchandise, or the chance to receive said merchandise, are thus determined wholly by lot or chance. The articles of merchandise have a value substantially greater than the price paid for each chance or push. The aforesaid respondents furnish, and have furnished, various push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of their merchandise by means of games of chance, gift enterprises or lottery schemes. The sales plans or methods involved in the sale of all of the said merchandise by means of said other push cards are the same as that herein above described varying only in detail as to the merchandise distributed and the number and prices of chances on each card.

7. Sales of merchandise of Dandy Products, Inc. pursuant to the aforesaid plan are consummated by mailing the order forms to Dandy Products, Inc. and by direct shipment of the merchandise from Dandy Products, Inc. to the customer. Dandy Products, Inc. also employs another firm, Package Mailers, to ship their merchandise to their customers.

8. The persons, to whom Dandy Products, Inc. and respondent, Joseph M. Gron, furnish and have furnished said push cards, use the same in selling and distributing said respondents' merchandise in accordance with the aforesaid sales plan. The aforesaid respondents thus supply to and place in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes

in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

Conclusions.

1. The law is well settled by an unbroken line of decisions too numerous to mention that the practice of selling merchandise by means of a gaming device or lottery, which includes push cards or punch boards, is a practice which is contrary to public policy of the United States, and that where such practice occurs in commerce it is an unfair trade practice and a violation of the Federal Trade Commission Act. *F. T. C.* v. *R. F. Keppel & Co., Inc.*, 291 U. S. 304 (1934); *Wren Sales Company, Inc.* v. *F. T. C.*, 296 F. 2d 456 (C. A. 7, 1961). The main thrust of respondents' argument is directed to the fact that many states in recent years have legalized pari-mutual betting, bingo, raffles, etc. and in such states these acts are no longer criminal offenses. In addition, respondents note that in recently proposed federal criminal legislation, and under existing federal criminal enactments, Congress did not include punch boards or push cards among the various types of gambling paraphernalia excluded as illegal from the mails or interstate commerce. Respondents therefore reason that since these various types of gambling or gambling devices are no longer illegal in many states, and have not been so designated under federal criminal laws, their use in merchandising is no longer against "public policy". Such is not the law. In *Maltz* v. *Sax*, 134 F. 2d 2 (C. A. 7, 1943), the court in considering this very argument said:

> "Moreover, in the absence of any statute condemning gambling as illegal, the Federal Courts have consistently condemned it as against public policy. *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227."

In addition, it is clear that a device which is calculated to appeal to the public's gambling instincts, may be considered an unfair act or practice, within the meaning of the Federal Trade Commission Act, when used in interstate commerce to sell or distribute merchandise, even though the device itself may not technically be a lottery or gambling device within the meaning of some penal or other statute. *Modernistic Candies, Inc.* v. *F. T. C.*, 145 F. 2d 454, 455 (C. A. 7, 1944) and *Lichtenstein* v. *F. T. C.*, 194 F. 2d 607, 611 (C. A. 9, 1952). It was stated in *Modernistic Candies, Inc.*:

> "We think the Commission . . . has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandise by gambling. . . ."

The Supreme Court has also recognized the distinction between criminal statutes outlawing lotteries and lottery devices and the Federal Trade Commission Act prohibiting *merchandising* by means of lotteries or lottery devices. In the *Keppel* Case, *supra*, the Court said:

> "A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, *even though it is not criminal*, was thought to involve the kind of unfairness at which the statute was aimed." [Emphasis supplied.]

Respondents also argue that prospective customers are given the opportunity of buying the merchandise outright at the stated prices without the necessity of using the

push cards or punch boards supplied by respondents. It is immaterial that some persons may purchase the merchandise without using the push cards or punch boards, since the push card or punch board devices are clearly designed to serve as an instrumentality for the sale of articles of merchandise by lottery methods. Its use for that purpose being prohibited under the Federal Trade Commission Act, it is of no consequence that some customers may conceivably elect not to use the lottery device. See *Globe Cardboard Novelty Co.* v. *F. T. C.*, 192 F. 2d 444, 448 (C. A. 3, 1951) and *Seymour Sales Co.* v. *F. T. C.*, 216 F. 2d 633, 636 (C. A. D. C., 1954).

2. The complaint herein charged, among other things, that, "All of the aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter refererd to."[1] The record contains no evidence to support this charge and complaint counsel apparently has abandoned this charge, since no reference to it is included in his proposed findings or conclusions. Although abandoning the charge of conspiracy, between the respondent corporation, Dandy Products, Inc., on the one hand, and Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, on the other hand, complaint counsel seeks a cease and desist order against the individual partners[2] on the theory that Capitol Mailers is an integral part of the scheme to sell merchandise by means of a lottery and performs an essential function by mailing the push cards.[3] In support of this position, complaint counsel relies

1. Complaint, Paragraph One, Second Paragraph on Page 2.

2. Inasmuch as Joseph M. Gron, as president of Dandy Products, Inc., was named a party respondent in his individual capacity and the order as hereinafter adopted so includes him, the actual effect of an order against the individual partners would be to include Carlo E. Ferrari.

3. No facts were adduced and no findings were proposed implicating or otherwise associating respondent, Carlo E. Ferrari, with the unfair acts and practices of Dandy Products, Inc., except as to the mailing services herein found.

on several cases which hold that aiding and abetting this method of merchandising make the participants *particeps criminis* so that all are engaged in unfair trade practices contrary to public policy.

The cases relied upon are as follows: *Modernistic Candies, Inc.* v. *F. T. C.*, 145 F. 2d 454, 455; *Maltz* v. *Sax*, 134 F. 2d 2; *Hamilton Manufacturing Co.* v. *F. T. C.*, 194 F. 2d 346; *U. S. Printing and Novelty Company* v. *F. T. C.*, 204 F. 2d 737, and *Wren Sales Company, Inc.* v. *F. T. C.*, 296 F. 2d 456. The first four cases cited above all concerned manufacturers of punch boards or variations thereof which were sold to others who utilized the punch boards in the sale or distribution of merchandise. Upholding a cease and desist order against the manufacturer of the board in *Maltz* v. *Sax*, *supra*, the court said:

> "Therefore, though his making and sale of punch boards may not be gambling, his status is fixed by his inseparable connection with the gambling business, and he will be left where he placed himself. . . ."

Capitol Mailers do not manufacture punch boards and their activities cannot be equated to any such close and inseparable connection with the gambling business. As heretofore found, Capitol Mailers performs a mailing service to over a hundred clients including Dandy Products, Inc. It acts under the direction and control of these clients in performing a routine task for which it is paid a set fee per item mailed. It does not process, handle, prepare for mailing or mail respondent's, Dandy Products, Inc., merchandise. Under these circumstances, and in the absence of any precedents extending the doctrine of the cases cited to persons engaged in providing mere routine services, a cease and desist order against Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, is not warranted and the hearing examiner so concludes.

The *Wren* case, referred to above, has no application to Capitol Mailers' activities, since the respondents in that case were engaged in the sale of their merchandise by means of punch boards in the same fashion as respondent herein, Dandy Products, Inc.

It would also be pointed out that as proposed by complaint counsel and as hereinafter adopted by the hearing examiner, the cease and desist order issued in this proceeding includes both respondent Dandy Products, Inc. and Joseph M. Gron, individually and as an officer of said corporation. Since the order will apply to Joseph M. Gron individually, it will apply to his activities as a partner in Capitol Mailers as well as an officer of Dandy Products, Inc. or in any other capacity and insures that the practices found to be against the public interest will be effectively stopped by the order to cease and desist.

In the Matter of *Bristol-Myers Co., et al.*, 46 F.T.C. 162, 176 (1949), the Commission had before it a somewhat comparable situation and stated:

> "The Commission is of the opinion, however, and in the exercise of its sound discretion concludes, that the complaint in this proceeding should be dismissed as to the respondents Pedlar & Ryan, Inc., and Young & Rubicam, Inc. This is for the reason that, although these respondents participated in the dissemination of the advertising found to be false or misleading, they at all times acted under the direction and control of respondent Bristol-Myers Co., their employer, with whom rested the final authority and responsibility for such advertising, and for the further reason that the practices found to be against the public interest will be stopped by the order to cease and desist issued against Bristol-Myers Co."

3. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of

merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents, Dandy Products, Inc. and Joseph M. Gron, and the element of chance involved therein and thereby are induced to buy and sell said respondents' merchandise.

4. The use by respondents, Dandy Products, Inc. and Joseph M. Gron, of the sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

5. The aforesaid acts and practices of the respondents, Dandy Products, Inc. and Joseph M. Gron, as herein found were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

6. The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding; and this proceeding is in the public interest.

Order.

It Is Ordered that the respondents, Dandy Products, Inc., a corporation, and its officers, and respondent, Joseph M. Gron, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of transistor radios, watches, cameras, ball point pens, toy animals, dolls, electrical appliances, cutlery, or any other articles of merchandise, in commerce, as "commerce" is

defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to, or placing in the hands of others push cards or any other lottery device or devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.
2. Shipping, mailing or transporting to agents or distributors, or to members of the purchasing public, push cards or any other lottery device or devices which are designed or intended to be used in the sale or distribution of respondents' merchandise, wares or goods to the public by means of a game of chance, gift enterprise or lottery scheme.
3. Selling or otherwise disposing of any merchandise, wares or goods by means of a game of chance, gift enterprise or lottery scheme.

It Is Further Ordered that the complaint herein be, and the same hereby is, dismissed as respects respondent, Carlo E. Ferrari.

William K. Jackson,
Hearing Examiner.

November 26, 1962.

APPENDIX B.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of Dandy Products, Inc., a corporation, and Joseph M. Gron, individually and as an officer of said corporation, and Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers,	Docket No. 8467. Decision of the Commission and Order to File Report of Compliance.

This matter having been heard by the Commission upon the exceptions to the initial decision filed by respondents and counsel supporting the complaint and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

It Is Ordered that the exceptions of respondents and

counsel supporting the complaint to the initial decision be, and they hereby are, denied.

It Is Further Ordered that the hearing examiner's initial decision filed November 27, 1962 be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that respondents Dandy Products, Inc. a corporation and Joseph M. Gron, individually and as an officer of said corporation shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Anderson dissenting in part and Commissioner MacIntyre concurring.

(Seal)

Joseph W. Shea,
Secretary.

Issued: June 28, 1963.

Attached are: Statement by Commissioner Anderson dissenting in part, and concurring statement by Commissioner MacIntyre.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

No. 14320 September Term, 1963 April Session 1964

DANDY PRODUCTS, INC., a corporation, and JOSEPH M. GRON, individually and as an officer of said corporation, and JOSEPH M. GRON and CARLO E. FERRARI, copartners trading and doing business as CAPITOL MAILERS,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

Petition to Review an Order of the Federal Trade Commission.

June 11, 1964

Before DUFFY, CASTLE and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* The question is whether the Federal Trade Commission's order that Dandy Products, Inc. and Joseph Gron, individually and as an officer of Dandy, cease and desist from using lottery devices or games of chance in sale or distribution of merchandise should be set aside because of a change in the "moral" climate of the business community. We think the order should stand.

Petitioners' briefs do not challenge, as they could not successfully do, the finding that the punchboard device used was a lottery device, or game of chance. *Federal*

Trade Commission v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304 (1934), *Gerson* v. *Federal Trade Commission*, 325 F. 2d 93 (7th Cir. 1963), *Wren Sales Co.* v. *Federal Trade Commission*, 296 F. 2d 456 (7th Cir. 1961), *Peerless Products, Inc.* v. *Federal Trade Commission*, 284 F. 2d 825 (7th Cir. 1960), *cert. denied*, 365 U. S. 844 (1961), *Goldberg* v. *Federal Trade Commission*, 283 F. 2d 299 (7th Cir. 1960), *Surf Sales Co.* v. *Federal Trade Commission*, 259 F. 2d 744 (7th Cir. 1958), *Modernistic Candies, Inc.* v. *Federal Trade Commission*, 145 F. 2d 454 (7th Cir. 1944).

But we are urged to turn away from *Keppel* because it was decided in "an earlier and different day" and involved children's market. However, *Modernistic Candies* involved both children and adults, and *Gerson* involved adults. The *Keppel* case was decided in 1934, and this court followed it in *Modernistic Candies* in 1944, has continued to follow it in more recent *Surf*, *Goldberg*, and *Peerless* cases, and in the 1961 *Wren Sales* case. Petitioners argue that "the moral tone of the business community in which [they] operate is substantially different" from that in *Keppel's* time, that criminal laws have developed which show a change in public policy with respect to gambling in general and punchboards in particular, and that the Commission erred in not taking evidence "of moral standards in the present business community with respect to this type of merchandising."

Without agreeing that morals are relative, as petitioners argue, we have considered petitioners' arguments that there are many contests, involving prizes, used by major companies; that in some states gambling is permitted and in others punchboards are held not to be gambling equipment; that gambling is not immoral per se, and is involved in stock brokerage and other businesses; and that a gambling "instinct" seems to be a weakness in human nature. All these arguments were addressed to the Com-

mission below, and in one degree or another have been addressed to this court, without success, in *Wren Sales*, *Peerless* and *Modernistic Candies*.[1] We are not persuaded that this merchandising practice is less an "unfair method of competition" today than it was in the time of *Keppel*.

The Commission was within the power granted to it, by Congress, in entering the order. See *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (9th Cir. 1952), *cert. denied*, 344 U. S. 819. And the law is firmly established that the merchandising practice found here is against the established public policy of the United States. *Peerless Products, Inc.* v. *Federal Trade Commission*, 284 F. 2d 825, 826 (7th Cir. 1960), *cert. denied*, 365 U. S. 844 (1961), *Surf Sales Co.* v. *Federal Trade Commission*, 259 F. 2d 744, 746 (7th Cir. 1958). As Chief Judge Hastings said in *Peerless*,

> "At the outset, we reaffirm that the 'law is now firmly established that the practice of selling goods by means which involve a game of chance, gift enterprise or lottery, including push cards such as we have here, is contrary to the established public policy of the United States and the sale and distribution, in interstate commerce, of such devices designed for the purpose of selling merchandise by games of chance or lottery is violative of the Federal Trade Commission Act.'"

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[1] The then Judge, later Supreme Court Justice, Minton disposed of a similar argument in *Modernistic Candies*:

> "Counsel for the petitioner discussed at great length from a sociological point of view, the age-old problem of the gambling instinct in the human being. According to his analysis, gambling pervades our entire economic system; thus insurance contracts are gambles, stock and grain exchange transactions are gambles, and the farmer's dependence on the weather is a gamble. Counsel's attempts to apply this analysis to the present case left us cold and unimpressed. He even reminded us that our great idol, Mr. Chief Justice Marshall in his day attended the horse races and wagered with his clergyman. In fact, they ran a book. As indicating how times have changed, and how even our coarse nature has yielded to the protecting

We see no merit in the claim that the order is erroneous because it failed to dismiss the partnership Capitol Mailers because the Commission found no evidence to warrant entering a cease and desist order against "• • • Gron and • • • Ferrari, copartners trading and doing business as Capitol Mailers • • •." The partners as individuals were respondents and the Commission dismissed as to Ferrari. This was proper and sufficient. The Commission prudently noted that the order against Gron individually will apply to his activities as a partner in Capitol Mailers.

In view of the fact that the Commission's finding as to the nature of the device is unchallenged, and sufficient to support the cease and desist order entered by the Commission, we need not pass on the question of limitation of cross-examination of witnesses with respect to the use of the merchandising device.

The petition to set aside the Commission's order is denied.

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care of governmental policy, we confess we do not even know a bookmaker, clerical or otherwise, and our passes to the beautiful race tracks around Chicago lie in our desk unused." 145 F. 2d at 454-55.

APPENDIX D.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois.

Tuesday, July 7, 1964.

Before

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

DANDY PRODUCTS, a corporation, et al., *Petitioners,*
No. 14320 *vs.*
FEDERAL TRADE COMMISSION, *Respondent.*

Petition for review of an order of the Federal Trade Commission.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

APPENDIX E.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

DANDY PRODUCTS, INC., a corporation, and JOSEPH M. GRON, individually and as an officer of said corporation, and JOSEPH M. GRON, and CARLO E. FERRARI, co-partners trading and doing business as CAPITOL MAILERS,
Petitioners.
vs.
FEDERAL TRADE COMMISSION,
Respondent.
} No. 14,320

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST.

July 10, 1964.

The Federal Trade Commission, having issued an order to cease and desist on June 28, 1963, against Dandy Products, a corporation and Joseph M. Gron, individually and as an officer of said corporation in a proceeding before it entitled "In the Matter of Dandy Products, Inc., a corporation, and Joseph M. Gron, individually and as an officer of said corporation, and Joseph M. Gron and Carlo E. Ferrari, copartners trading and doing business as Capitol Mailers, Docket No. 8467" and a petition to review and set aside said order to cease and desist having been filed in this Court on September 17, 1963; and the transcript of the entire record in the proceedings which resulted in the

said order to cease and desist having been certified and filed in this Court; and the matter having been heard by this Court on briefs and oral argument on May 19, 1964; and this Court having rendered its decision on June 11, 1964;

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to set aside the order of the Federal Trade Commission in this cause be, and it hereby is denied; that the aforesaid order to cease and desist of the Federal Trade Commission herein be, and it hereby is, affirmed, and that Dandy Products, Inc., and Joseph M. Gron, hereby are commanded forthwith to obey said order and to comply therewith.

By the Court:

/s/ F. Ryan Duffy,
United States Circuit Judge,

/s/ Latham Castle,
United States Circuit Judge,

/s/ Roger J. Kiley,
United States Circuit Judge.

A True Copy:
Teste:

(Seal)

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

Dated: July 10, 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 549

DANDY PRODUCTS, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-20) is reported at 332 F. 2d 985. The Commission's decision and order (Pet. App. 15-16) and the Initial Decision of the Hearing Examiner (Pet. App. 1-14) are unreported.

JURISDICTION

The final decree of the court of appeals (Pet. App. 22-23) was entered on July 10, 1964. The petition

for a writ of certiorari was filed on October 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners Dandy Products, Inc. ("Dandy") and its president, Gron, committed unfair acts and practices, in violation of Section 5 of the Federal Trade Commission Act, by using games of chance to sell merchandise.

2. Whether the Commission properly entered a cease-and-desist order against petitioner Gron individually as well as in his capacity as president of Dandy.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in pertinent part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * *
>
> (a)(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The Federal Trade Commission charged Dandy Products, Inc. ("Dandy"), Joseph M. Gron, the pres-

ident of Dandy and a partner in Capitol Mailers ("Capitol"), and Ferrari (Gron's partner in Capitol), with unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. The complaint alleged that they had used lottery schemes or games of chance in the sale and distribution of merchandise (Pet. App. 1).

The Commission (Pet. App. 15-16) adopted the hearing examiner's findings of fact, conclusions and order (Pet. App. 1-14). The findings, which are not here challenged, establish the following facts: Dandy is engaged in the public sale and distribution in interstate commerce of radios, watches, electrical appliances and other articles; Gron, its president, "formulates, directs and controls the acts and practices of" Dandy (Pet. App. 2-3). Dandy and Gron furnished members of the public the equipment for operating various plans of merchandising involving the use of games of chance or lottery schemes. A typical example of Dandy's business activities, described at Pet. App. 4-7, was the distribution of punch boards or push cards, and related circulars and materials, pursuant to which merchandise was offered as premiums or prizes to other members of the public who purchased "pushes" or chances on the cards. The value of the article far exceeded the amount paid for the punch or push, and the element of chance alone determined whether the purchaser received any merchandise and how much he paid for the punch or push (Pet. App. 7, 12-13). The mailing of the push cards and related materials was handled for Dandy by Capitol Mailers,

a firm which also provided mailing services to more than 100 other clients (Pet. App. 3-4).

The Commission concluded that in selling and distributing merchandise by these means Dandy and Gron committed unfair trade practices in violation of Section 5 of the Federal Trade Commission Act. It cited "an unbroken line of decisions" holding that the distribution of merchandise through games of chance violated Section 5, and rejected the contention that the public policy which underlay these decisions had changed (Pet. App. 8-9, 13.) It ordered Dandy, Gron individually and as an officer of Dandy, and their employees and agents, to cease and desist from selling or disposing of merchandise by use of games of chance, and from supplying or shipping push cards or other lottery devices to be used in such sale or disposal of merchandise (Pet. App. 13-14).

As to Capitol Mailers, the Commission held that it performed only a routine mailing service under Dandy's instructions similar to that which it provided for many other clients, did not handle Dandy's merchandise and did not manufacture the push cards. The Commission concluded that relief against Gron and Ferrari, as copartners of Capitol, was not warranted (Pet. App. 10-11), and dismissed the complaint as to Ferrari (Pet. App. 14). The Commission noted that since the cease-and-desist order applied to Gron individually, it would also prevent him from continuing the illegal practices by his activities as a partner in Capitol or in any other capacity (Pet. App. 12).

The Court of Appeals for the Seventh Circuit up-

held the Commission's order (Pet. App. 17-20), rejecting the petitioners' contention that because of "a change in the 'moral' climate of the business community" their practices should no longer be deemed "unfair."

ARGUMENT

1. In *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, this Court held that the use of a punch board or other lottery scheme or game of chance in the sale of merchandise was against public policy and was an "unfair method of competition" in violation of Section 5 of the Federal Trade Commission Act.[1] Since that time various courts of appeals have upheld Commission orders directed against the sale or distribution of merchandise through punch boards, push cards and similar games of chance, and

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[1] The Court stated [291 U.S. at 313]:

> "It employs a device whereby the amount of the return they [purchasers] receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair.'"

this Court several times has declined to review those decisions.[2]

Petitioners urge (Pet. 13-18) that *Keppel* should be reconsidered, on the ground that "our society has changed radically" since the case was decided in 1934, and that today the sale of goods through games of chance no longer contravenes public policy. But whatever changes there may have been during the past 30 years in the public attitude toward gambling as a form of recreation, there is no indication that public condemnation of the use of gambling devices as a method of selling merchandise is any less severe today than when *Keppel* was decided. The numerous courts of appeals' decisions that have condemned such schemes (see note 2, *supra*) cover substantially the entire period between the decision in *Keppel* and the present time, and there is no need to reexamine this settled authority.[3]

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[2] *E.g.: Wren Sales Co.* v. *Federal Trade Commission*, 296 F. 2d 456 (C.A. 7, 1961); *Goldberg* v. *Federal Trade Commission*, 283 F. 2d 299 (C.A. 7, 1960); *Peerless Products, Inc.* v. *Federal Trade Commission*, 284 F. 2d 825 (C.A. 7, 1960), certiorari denied, 365 U.S. 844; *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (C.A. 9, 1952), certiorari denied, 344 U.S. 819; *Modernistic Candies, Inc.* v. *Federal Trade Commission*, 145 F. 2d 454 (C.A. 7, 1944); *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718 (C.A. 9, 1939); *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. 2d 561 (C.A. 8, 1937); *Rosten* v. *Federal Trade Commission*, 263 F. 2d 620 (C.A. 2, 1959); *Drath* v. *Federal Trade Commission*, 239 F. 2d 452 (C.A.D.C., 1956), certiorari denied, 353 U.S. 917; *Gay Games, Inc.* v. *Federal Trade Commission*, 204 F. 2d 197 (C.A. 10, 1953).

[3] In addition to the present case (Pet. App. 18-19), the court below thrice has rejected the argument that a change

Petitioners also argue (Pet. 8-11) that *Keppel* was decided under the original wording of Section 5, which prohibited only "unfair methods of competition"; that the Wheeler-Lea amendments of 1938 broadened Section 5 to prohibit "unfair or deceptive acts or practices"; and that because the latter provision, which is involved in the present case, does not define "unfair * * * practices," the Commission cannot determine that a particular practice is "unfair" without receiving evidence of its impact upon consumers. We submit, however, that *Keppel* establishes the illegality of petitioner's activities as "unfair * * * acts or practices" as well as an "unfair method of competition." The basic rationale of *Keppel* was that a device "whereby the amount of the return [purchasers] receive from the expenditure of money is made to depend upon chance" is "unfair" because it "is of the sort which the common law and criminal statutes have long deemed contrary to public policy" (291 U.S. at 313). This reasoning is equally applicable when the use of games of chance to sell merchandise is challenged as an unfair act or practice rather than as an unfair method of competition. The legislative history of the Wheeler-Lea amendments shows that they were designed to overturn this Court's holding in *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 646-

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in business practices warranted reexamination of the underlying premise in *Keppel* that the use of games of chance to sell merchandise is contrary to public policy. *Wren Sales Co.* v. *Federal Trade Commission*, 296 F. 2d 456 (1961); *Peerless Products, Inc.* v. *Federal Trade Commission*, 284 F. 2d 825 (1960), certiorari denied, 365 U.S. 844; *Modernistic Candies, Inc.* v. *Federal Trade Commission*, 145 F. 2d 454 (1944).

647, that the Commission was required to prove injury to competition in order to establish a violation of Section 5.[4] They were not intended, however, to overturn the ruling in *Keppel* that the use of lottery schemes in the sale of merchandise is unfair.

2. Upon finding that Gron had violated the Act, the Commission was justified in entering a cease-and-desist order against him not only as an officer of Dandy but also individually. Petitioners contend (Pet. 18-19) that since Gron's unlawful acts were done only in connection with Dandy's operations, the order against him should be similarly limited and should not cover his activities as a partner in Capitol Mailers. The short answer is that since Gron, as the president of Dandy, "formulates, directs and controls [Dandy's] acts and practices" (Pet. App. 2), the Commission was justified in concluding that he should be enjoined from engaging in such practices in any capacity, in order to insure that the order will be "fully effective in preventing the unfair * * * practices which the Commission had found to exist." *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 119-120; *Surf Sales Co.* v. *Federal Trade Commission*, 259 F. 2d 744 (C.A. 7); cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473.

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[4] 83 Cong. Rec. 391, 395-397, 3255. See, also, the discussion of the legislative history in *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607, 609-610 (C.A. 9), certiorari denied, 344 U.S. 813.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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